Supreme Court, U.S.
FILED
MAY 24 2005
OFFICE OF THE CLERK

No. 04-1168

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, CROSS-PETITIONERS

v.

PROMETHEUS RADIO PROJECT, ET AL.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE CROSS-PETITIONERS

AUSTIN C. SCHLICK
Acting General Counsel
Federal Communications Commission
Washington, D.C. 20554

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

Page

A. The "Public Interest" respondents have shown neither that the Court should deny the government's conditional petition, nor that the court of appeals' judgment was correct 2

B. The Court should deny all of the petitions in this case, but if it grants any petition, it should also grant the government's petition 7

TABLE OF AUTHORITIES

Cases:

Cello P'Ship v. *FCC*, 357 F.3d 88 (D.C. Cir. 2004) 8

FCC v. *National Citizens Comm. for Broad.*, 436 U.S. 775 (1978) 2

NBC v. *FCC*, 319 U.S. 190 (1943) 7

Statutes:

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56:

§ 202, 110 Stat. 110 7

§ 202(h), 110 Stat. 111-112 8

Miscellaneous:

John W. Berresford, FCC Media Staff Research Paper 2205-2, *The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Times Has Passed, available at* <http:www.fcc.gov.mb.mbpapers.html> 3

In the Supreme Court of the United States

No. 04-1168

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, CROSS-PETITIONERS

v.

PROMETHEUS RADIO PROJECT, ET AL.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE CROSS-PETITIONERS

OPINIONS BELOW

As explained in the conditional cross-petition and the government's brief in opposition in Nos. 04-1020, 04-1033, 04-1036, 04-1045, and 04-1177, the Court should deny all of the petitions for a writ of certiorari in this case and should permit administrative proceedings on remand to go forward before the Federal Communications Commission. Gov't Opp. 12-15; Cross-Pet. 13-19. As the government's conditional cross-petition also explains, however, if the Court were to grant one or more of the petitions in this case, it should also grant the government's cross-petition and review the court of appeals' incorrect determination that the FCC failed to provide a reasoned analysis to support its revised broadcast ownership rules.

A. The "Public Interest" Respondents Have Shown Neither That The Court Should Deny The Government's Conditional Petition, Nor That The Court Of Appeals' Judgment Was Correct

1. The self-described "Public Interest" (PI) respondents argue (PI Opp. 22, 24) that the Court should deny the government's conditional cross-petition because the court of appeals correctly articulated the relevant standard of judicial review and the court's application of that standard—incorrect or not—does not warrant review by this Court. The government does not disagree, provided that *all* the petitions are denied. Cross-Pet. 17 n.8; Gov't Opp. 14-15. As the government explains in the cross-petition, however, the Court should not consider the constitutional and statutory issues raised by other petitioners, which assume the existence of certain FCC rules, unless it first resolves whether the revised broadcast ownership rules actually adopted by the FCC survive review under the Administrative Procedure Act. Cross-Pet. 19-20. Indeed, granting review on the constitutional questions in the procedural posture of this case is unnecessary because those questions have already been settled by decisions of this Court and their consideration would in any event be inconsistent with settled rules requiring the avoidance of constitutional decisions when possible and favoring the resolution of constitutional questions in specific factual settings. Cross-Pet. 18 & n.9.[1]

---

[1] The government also agrees with the PI respondents (PI Opp. 4-9) that continuing spectrum scarcity and the consequent need for government allocation of spectrum—a feature unique to broadcasting—continues to provide a sound rationale for the "rational basis" standard of First Amendment review under *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978), and prior cases. As would be expected, there has been academic discussion of that issue, extending

2. The conditional cross-petition identifies three specific errors committed by the court of appeals in reversing the revised ownership rules. Cross-Pet. 21-28. The PI respondents fail to rebut that showing of error.

a. The court of appeals erred when it reversed the Commission's decision to assign an equal weight for purposes of the Diversity Index to all broadcast outlets in the same medium without regard to their market share. The court failed to review deferentially the Commission's predictive judgments and public policy reasons for treating similar media the same, but instead substituted its own judgment that stations should be weighted according to their market share at a particular time. Cross-Pet. 21-24.

The PI respondents contend that the Commission acted arbitrarily when it assigned equal weight to media of the same type (*e.g.*, all television stations received the same weighting), because the Commission had elsewhere in its Order assigned different weights to media of *different* types (*e.g.*, television stations were weighted differently from radio stations). PI Opp. 22. There is no inconsistency. The Commission explained at length (see 04-1020 Pet. App.

---

even to a recent paper by an FCC staff member who disagrees with the scarcity rationale. See John W. Berresford, FCC Media Staff Research Paper 2005-2, *The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed, available at* <http://www.fcc.gov.mb.mbpapers.html>. As its disclaimer makes clear, however, that paper expresses opinions that are solely "those of the author * * * and do not necessarily represent the views of the Media Bureau, Commissioners, or any other staff member or organizational unit within the [FCC]." *Id.* at *i*. The PI respondents correctly note (Br. 4-8) that Congress has consistently recognized the need for the government, in performing the necessary function of allocating spectrum, to do so with an eye in part to establishing conditions that will encourage a diversity of voices, and the Commission itself has reached the same conclusion. See Cross-Pet. 20-21.

492a-499a (Order ¶¶ 409-419)) that it weighed different media differently based on empirical evidence it had gathered in a survey, which "ma[d]e it clear that some media are more important than others." *Id.* at 492a (Order ¶ 409). The Commission acknowledged that the survey "is not a perfect measure," but, after a thorough analysis, it reasonably concluded that it had "no reason to believe that all media are of equal importance," and it therefore acted reasonably in assigning different weights to different media. *Ibid.* The PI respondents do not challenge any aspect of that explanation.

The PI respondents also argue that the court of appeals correctly remanded the case because assigning equal weights to outlets in the same medium leads to the allegedly "absurd result[]" of small media outlets of one type (such as television stations) being assigned weights greater than larger outlets of another type (such as newspapers). PI Opp. 22. That argument ignores the Commission's well-reasoned choice to focus on the *availability* of a given medium—*i.e.*, the diversity created by the ability of many different voices to reach the public—rather than the market shares of individual stations—*i.e.*, the relative number of people who happen to choose to watch or listen to different voices at a particular point in time. See Cross-Pet. 23-24. The PI respondents, like the court of appeals itself, do not challenge the reasoning that the Commission invoked to support its legitimate policy choice. Their inability to rebut that reasoning simply confirms that the court of appeals inappropriately substituted its own view of how best to advance the public interest for the view of the Commission.

b. Similar errors infect the PI respondents' discussion of the Internet as a contributor to media diversity. PI Opp. 23. The cross-petition demonstrated that the court of ap-

peals erred when it concluded that the Commission had to identify specific Internet sites that currently provide local news and information before it could consider the Internet as a source of local news and information. The court should have deferred to the Commission's reasonable conclusion that the Internet has the *capability* to provide such content (and in fact does so) and thus may properly be deemed a local news and information source. Cross-Pet. 24-27.

Respondents do not take issue with that argument. Instead, they attempt to defend the court of appeals' view that because the Commission determined that cable television systems are not a source of local news and information, it had to treat the Internet in the same way. PI Opp. 23 (citing 04-1020 Pet. App. 52a). That view is mistaken. The Commission found that the administrative record contained insufficient evidence to conclude that cable television contributed to local diversity, 04-1020 Pet. App. 493a-495a (Order ¶¶ 412-414). By contrast, the administrative record did contain evidence that persons actually use the Internet for local news and public affairs information. *Id.* at 488a, 493a (Order ¶¶ 405, 412). Moreover, as explained in the cross-petition, the Internet has a far greater potential than cable television to deliver such information. Cross-Pet. 25-26 n.13. In particular, the Internet has no gatekeeper that exercises control over its content. *Ibid.* The Commission thus made the legitimate policy choice to consider the Internet as a source of local information and news. By overriding that administrative judgment, the court of appeals impermissibly substituted its own policy views for those of the Commission.

c. Finally, the conditional cross-petition shows that the court of appeals incorrectly failed to defer to the Commission's line-drawing determinations in the media ownership order. Specifically, the court erred when it reversed the

Commission's judgments about the permissible types of cross-media common ownership and the allowable number of commonly owned radio stations. Cross-Pet. 27-28.

For example, the PI respondents argue that the court of appeals correctly remanded the limits on local radio ownership "because of the irrational and inconsistent manner in which they were developed." PI Opp. 24 n.16. Respondents observe that, in setting the minimum number of post-transaction television station operators that must remain in a local market for a transfer-of-control transaction to be approved, the agency invoked the *DOJ/FTC Merger Guidelines*, but it did not similarly invoke those Guidelines with respect to radio station ownership. 04-1020 Pet. App. 103a. As explained in the cross-petition, however, the Commission used the *Merger Guidelines* as analogous authority when developing limits of television station ownership; it did not directly adopt or apply those Guidelines. Cross-Pet. 27 n.14. The law does not require the derivation of administrative rules in one area, such as television, to mirror precisely the derivation of rules in another, such as radio.

In any event, the Commission explained that the radio ownership tiers "ensure that, in markets with between 27 and 51 radio stations, there will be approximately five or six radio firms of roughly equal size," 04-1020 Pet. App. 402a-403a (Order ¶ 289), which is roughly equivalent to the result under the Commission's modified local television ownership rule, which ensures "that there are at least six firms in [a] significant number of markets." *Id.* at 348a (Order ¶ 207). The Commission committed no error when it developed radio station ownership limits without analogizing to the Guidelines.

B. The Court Should Deny All Of The Petitions In This Case, But If It Grants Any Petition, It Should Also Grant The Government's Petition

1. The National Association of Broadcasters (NAB) does not oppose the government's conditional cross-petition. See NAB Resp. 12. NAB argues, however, that the Court should grant its own petition for a writ of certiorari even if the Court denies the government's cross-petition. NAB claims that "granting the [government's] conditional cross-petition is [not] necessary for this Court to consider the issues raised in NAB's petition." *Id.* at 10. Whether or not it is possible to consider NAB's claims separately from the government's conditional cross-petition, however, it would be inappropriate, and inconsistent with this Court's practice, to consider the various constitutional and statutory challenges to the regulations without first considering the validity of those regulations under ordinary principles of administrative law. Cross-Pet. 19-20 (citing *FCC* v. *National Citizens Comm. for Broad.*, 436 U.S. 775, 793 (1978); *NBC* v. *FCC*, 319 U.S. 190, 226 (1943)). The government's cross-petition squarely presents that question, and NAB does not argue to the contrary. Accordingly, if the Court grants any of the petitions, including NAB's, it should also grant the government's petition.

2. NAB devotes the bulk of its response to the government's cross-petition to making a arguments that are in fact directed at supporting NAB's own petition. NAB Resp. 2-8. For example, NAB argues (Resp. 2-3) that Section 202 should be read as "placing [a] deregulatory 'thumb on the scale' in connection with the FCC's § 202(h) review of broadcast ownership restrictions."

Contrary to NAB's argument, there is no conflict between the D.C. and Third Circuits on the standard of review under Section 202. To be sure, there are verbal differ-

ences in the formulations used by the two circuits. But, as the cross-petition explains (at 16 n.7), the D.C. Circuit's most recent decision on the issue, in *Cellco Partnership* v. *FCC*, 357 F.3d 88, 98 (2004), held that a provision of the Communications Act using language virtually identical to that of Section 202(h) places no such "thumb on the scale," and the Third Circuit here adopted that same position. See 04-1020 Pet. App. 30a-32a. There is no conflict on that issue.

The court of appeals correctly rejected NAB's position, because nothing in Section 202 suggests that a "thumb on the scale" standard of review is appropriate. Although Section 202 requires the Commission to revise and liberalize specific media ownership limitations, Congress did not provide (as it could have done) that those new limitations should be permanent or should be viewed as the maximum limits permissible. To the contrary, Congress addressed the permanence of those limits in Section 202(h), where Congress ordered the Commission to engage in a regular review of "ownership rules" and to "repeal *or modify* any regulation it determines to be no longer in the public interest." 110 Stat. 111-112 (emphasis added). There is no reason to construe the phrase "or modify" to place a "thumb on the scale" with respect to what modifications are appropriate.

3. NAB also argues (Resp. 1-4) that the Court should grant review now in order to spare NAB's members the consequences of waiting for remand proceedings before the agency. The harm alleged by NAB, however, amounts to nothing more than an inability to achieve greater degrees of what NAB terms (*id.* at 1) "the benefits of common ownership" of radio stations and of the "top-4" television stations in a market. But rather than a showing of injury, that is just a restatement of NAB's position that the FCC erred

in determining that the public interest requires limitations on consolidation and cross-ownership by FCC licensees. Moreover, the radio station rules challenged by NAB themselves did not involve alteration of the numerical ownership limits. Instead, they involved the Commission's determinations that a commercially accepted ratings service provides a "more rational and coherent methodology" for defining local radio markets than the agency's former technique, 04-1020 Pet. App. 377a, and that joint sales agreements "put pricing and output decisions in the hands of a single firm" and should therefore be treated much like common ownership, *id.* at 425a. The FCC is an expert agency with very substantial experience and expertise in the broadcast industry. The Commission's line-drawing determinations on questions like those challenged by NAB do not warrant review by this Court.

* * * * *

For the foregoing reasons, and those stated in the cross-petition, all of the petitions for a writ of certioari should be denied. If the Court decides to grant any of the petitions, however, the government's cross-petition for a writ of certiorari should also be granted.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

AUSTIN C. SCHLICK
Acting General Counsel
Federal Communications Commission

MAY 2005